No. 13111

In the United States Court of Appeals for the Ninth Circuit

IDALIA O. FRATT, APPELLANT

v.

JOHN R. ROBINSON AND JANE DOE ROBINSON, HUSBAND AND WIFE, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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Our main brief, we believe, adequately answers the various arguments proffered by appellees. We desire to comment, however, on the quotations from the *Barrett* opinion and the *Meyer* treatise, which are set forth in appellees' brief but which did not appear in defendants' briefs below.

First: On page 16 of their brief appellees assert that the Commission's present position as to the scope of the over-the-counter market is "absolutely contrary" to the view which it expressed in 1941 in the case of *In the Matter of Barrett & Co.,* 9 S. E. C. 319, at 323. Portions of the *Barrett* opinion are quoted on pages 76–77 of appellees' brief. If the quoted text is read in light of the context of the opinion it will

readily be apparent that the Commission was describing the markets in particular securities made or created by brokers and dealers specializing in those securities, and the mechanics of quoting in these specialized markets, so as to provide the reader with the factual background necessary to an understanding of the over-the-counter manipulation with which that case was concerned. It should be recalled that because of the opportunities for manipulation in these specialized broker-dealer markets Congress, in the *original* provisions of Section 15 of the 1934 Act, authorized the detailed regulation of these markets although it postponed until the 1936 and 1938 amendments its full statutory program with respect to the regulation of other broker-dealer transactions and activities.

Second: On pages 74–75 appellees quote from Meyer, *The Securities Exchange Act of 1934, Analyzed and Explained* (published in 1934), pp. 106–107. Like many other excerpts quoted by appellees, this one, too, deals with the scope of the *original* (but since *repealed*) provisions of Section 15, with which we have already dealt at length. Earlier, at page 85 of his treatise, in discussing Section 10, Meyer observed: "Persons affected by this section are all who use the facilities of an exchange or the mails or interstate commerce."

The basic fallacy in the contention which appellees have predicated on these quotations—as in their entire argument with respect to the limited scope of Section 10 (b)—is their unfounded assumption that the general anti-fraud provision of the 1934 Act was some-

how intended to be narrower in scope than its analogue in Section 17 (a) of the Securities Act of 1933 in that it was meant to apply only to securities traded in the organized markets, whatever they may be. We have no quarrel with the excerpts from various sources quoted by appellees which describe the over-the-counter market as applied to the trading activities of professional brokers and dealers. Most of the trading in securities which is conducted off the exchanges does take place, of course, in this more or less organized portion of the over-the-counter market. Apart from the invalidity of appellees' contention that nonprofessional transactions are not effected in the "over-the-counter market," that term is not employed in Section 10 (b) and there appears to be no need for the Court to define it in this case. Our view of Section 10 (b) is based on the plain language of that section and what appears to us to be the obvious purpose of Congress—that Section 10 (b) of the 1934 Act, like Section 17 (a) of the 1933 Act, was intended to be universal in scope, with no exemptions whatsoever, provided only that there has been use of the mails or channels of interstate commerce.

Respectfully submitted.

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